Timbalan Ketua Polis Kelantan & Anor v Ishak bin Mansor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-01–121 OF 2006

ZALEHA ZAHARI, JEFFREY TAN AND CLEMENT SKINNER JJCA

3 SEPTEMBER 2012

Police — Disciplinary proceedings — Dismissal — Public Officers (Conduct and Discipline) Regulations 1993 regs 37 and 38(g) — Appeal — Junior police officer — Whether 1993 Regulations applicable — Validity of dismissal order — Restriction order — Correct procedure to be adopted by disciplinary authority — Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(A)(1)

The plaintiff was a corporal in the Royal Malaysia Police Force. On 13 April 1997, he was served with a show cause notice by the first defendant for eight disciplinary offences and was informed that an inquiry would be held. However, the inquiry did not take place. Next, the plaintiff was issued with a restriction order under s 4(A)(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('1969 Ordinance') for a period of two years with effect from 15 April 1997. The first defendant then, by virtue of the Public Officers (Conduct and Discipline) Regulations 1993 ('1993 Regulations') suspended the plaintiff from exercising his duties and informed the latter that he would not be paid any emoluments during the period of his suspension. The plaintiff was later dismissed with effect from the date of the restriction order, by virtue of regs 37 and 38(g) of the 1993 Regulations. Two years later, the plaintiff filed a suit in the High Court and it was held that the 1993 Regulations did not apply to the plaintiff as he was only a junior police officer. The High Court judge further deliberated that in the absence of a provision similar to reg 37 of the 1993 Regulations being inserted into the Police (Conduct and Discipline) (Junior Police Officers and Constables) 1970 Regulations ('1970 Regulations'), it was not open for the disciplinary authority to apply the procedure set out in reg 37 of the 1993 Regulations, to the plaintiff. The dismissal order was then declared to be invalid and set aside and the plaintiff's application was allowed. In the present appeal, the Senior Federal Counsel submitted that the learned judge erred in ruling that the plaintiff can only be subjected to only one disciplinary regulation. Without an express provision in the 1970 Regulations prescribing the procedure to be followed, the disciplinary authority was right in adopting the procedure prescribed under reg 37 of the 1993 Regulations. The Court of Appeal was burdened with the question as to the correct procedure to be adopted by a disciplinary authority

upon being notified that a restriction order under the 1969 Ordinance had been made against a junior police officer.

Held, allowing appeal with costs:

(1) The provisions of the Federal Constitution, the Police Act 1967 ('Act') and the 1970 and 1993 Regulations must be read together. Every police officer unless expressly excluded was subject to the same provisions as were applicable to other public officers of corresponding status in the service of the government of Malaysia (s 74 of the Act). Pursuant to art 132 of the Federal Constitution a member of the police force was a member of the public service. All members of the Police Force were also subject to regulations relating to discipline as may from time to time be made by the Yang di-Pertuan Agong under art 132(2) of the Federal Constitution or under s 96 of the Act (s 18 of the Act). This would include junior police officers (see paras 25 & 26).

(2) The court was unable to agree with the learned judge's ruling that a junior police officer can only be subjected to only one disciplinary regulation. There was no such general principle as a junior police force could certainly be subjected to more than one. Whether or not a particular regulation was applicable to such an officer must necessarily depend on the express words used in that regulation (see para 27).

(3) Not only were the 1970 Regulations applicable to the plaintiff, but the 1993 Regulations were equally applicable to him. There were no clauses in the 1993 Regulations expressly excluding junior police officers from its application. Effect must be given to reg 2 of the 1993 Regulations which expressly provided that the 1993 Regulations applied to an 'officer' throughout the period of his service. The same section defines an 'office' to mean 'a member of the public service of the Federation', of which the plaintiff was certainly one (see para 28).

(4) There was no flaw in the decision-making process of the disciplinary authority in making the order of dismissal against the plaintiff. Once the restriction order under the 1969 Ordinance had been issued by the Minister of Home Affairs against the plaintiff, it was incumbent upon the disciplinary authority to exercise the power conferred upon them by regs 36 and 46. Therefore, reg 37 of the 1993 Regulations applied (see para 37).

[Bahasa Malaysia summary

Plaintif merupakan seorang koperal dalam Polis Diraja Malaysia. Pada 13 April 1997, dia diserahkan dengan satu notis tunjuk sebab oleh defendan pertama untuk lapan kesalahan disiplin dan dimaklumkan bahawa satu penyiasatan akan dijalankan. Walau bagaimanapun, penyiasatan tersebut tidak berlangsung. Kemudian, plaintif dikenakan dengan satu perintah sekatan di

bawah s 4(A)(1) Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969 ('Ordinan 1969') bagi tempoh dua tahun bermula daripada 15 April 1997. Defendan pertama kemudiannya, menurut Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturan 1993') menggantung plaintif daripada menjalankan tanggungjawabnya dan memaklumkan plaintif bahawa dia tidak akan dibayar sebarang gaji semasa tempoh penggantungannya. Plaintif kemudiannya dipecat bermula daripada tarikh perintah sekatan, menurut peraturan 37 dan 38(g) Peraturan-Peraturan 1993. Dua tahun kemudian, plaintif memfailkan satu guaman di Mahkamah Tinggi dan diputuskan bahawa Peraturan-Peraturan 1993 tidak boleh digunakan terhadap plaintif memandangkan dia hanya merupakan pegwai polis berpangkat rendah. Hakim Mahkamah Tinggi selanjutnya mempertimbangkan bahawa ketiadaan peruntukan sama dengan peraturan 37 Peraturan-Peraturan 1993 yang dimasukkan ke dalam Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Konstabel) ('Peraturan-Peraturan 1970'), maka adalah tidak terbuka untuk badan disiplin untuk menggunakan prosedur seperti yang dinyatakan dalam peraturan 37 Peraturan-Peraturan 1993 kepada plaintif. Perintah pemecatan oleh itu diisytihar tidak sah dan diketepikan dan permohonan plaintif dibenarkan. Dalam rayuan ini, peguam kanan persekutuan menghujah bahawa hakim bijaksana terkhilaf dalam memutuskan bahawa plaintif hanya tertakluk kepada satu peraturan disiplin. Tanpa peruntukan tersurat dalam Peraturan-Peraturan 1970 menetapkan prosedur yang perlu diikuti, badan disiplin adalah benar ketika menggunakan prosedur yang ditetapkan di bawah peraturan 37 Peraturan-Peraturan 1993. Mahkamah Rayuan dibebani dengan persoalan mengenai prosedur yang tepat untuk digunakan oleh badan disiplin selepas dimaklumkan bahawa satu perintah sekatan di bawah Ordianan 1969 dibuat terhadap seorang pegawai polis berpangkat rendah.

Diputuskan, membenarkan rayuan dengan kos:

(1) Peruntukan-peruntukan Perlembagaan Persekutuan, Akta Polis 1967 ('Akta') dan Peraturan-Peraturan 1970 dan 1993 perlu dibaca bersama. Setiap pegawai polis melainkan secara tersurat dikecualikan adalah terpakai kepada pegawai awam lain yang berpangkat sama di dalam perkhidmatan kerajaan Malaysia (s 74 Akta). Menurut Perkara 132 Perlembagaan Persekutuan, seorang ahli pasukan polis merupakan seorang ahli perkhidmatan awam. Kesemua ahli pasukan polis adalah tertakluk kepada peraturan-peraturan berhubung disiplin daripada masa ke semasa yang digubal oleh Yang di-Pertuan Agong di bawah perkara 132(2) Perlembagaan Persekutuan atau di bawah s 96 Akta (s 18 Akta). Ini termasuklah pegawai polis berpangkat rendah (lihat perenggan 25 & 26).

(2) Mahkamah tidak dapat bersetuju dengan keputusan hakim bijaksana bahawa seorang pegawai polis berpangkat rendah hanya tertakluk kepada

satu peraturan disiplin. Tidak terdapat prinsip umum bahawa seorang pegawai polis berpangkat rendah boleh tertakluk kepada lebih daripada satu. Sama ada peraturan tersebut terpakai kepada pegawai tersebut ataupun tidak, adalah bergantung kepada perkataan tersurat yang dinyatakan di dalam peraturan tersebut (lihat perenggan 27).

(3) Bukan sahaja Peraturan-Peraturan 1970 terpakai kepada plaintif, tetapi Peraturan-Peraturan 1993 turut sama terpakai kepadanya. Tiada klausa-klausa dalam Peraturan-Peraturan 1993 secara tersurat mengecualikan pegawai polis berpangkat rendah daripada penggunaannya. Kesan perlu diberikan kepada peraturan 2 daripada Peraturan-Peraturan 1993 yang secara jelas memperuntukkan bahawa Peraturan-Peraturan 1993 terpakai kepada 'pegawai' sepanjang tempoh perkhidmatannya. Seksyen yang sama mendefinisikan 'pegawai' bermaksud 'seorang ahli perkhidmatan awam Persekutuan' di mana plaintif adalah salah seorang daripadanya (lihat perenggan 28).

(4) Tiada kecacatan dalam proses membuat keputusan oleh badan disiplin ketika membuat perintah pemecatan terhadap plaintif. Apabila perintah sekatan di bawah Ordinan 1968 dikeluarkan oleh Menteri Dalam Negeri terhadap plaintif, ia adalah tanggungjawab ke atas badan disiplin untuk melaksanakan kuasa yang diberikan kepada mereka oleh peraturan 36 dan 46. Oleh itu, peraturan 37 Peraturan-Peraturan 1993 terpakai (lihat perenggan 37).]

Notes

For cases on dismissal, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1306–1338.

Cases referred to

Nordin bin Hj Zakaria P/SAC II Timbalan Ketua Polis Kelantan & Anor v Mohd Noor Abdullah [2004] 3 AMR 689, FC (refd)

Selvaraju Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 7 MLJ 1; [2007] 6 CLJ 245, FC (refd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(A)(1)

Federal Constitution arts 132, 132(2), 135(2), 2(d)

Police Act 1967 ss 18, 74, 96

Public Officers (Conduct and Discipline) (Junior Police Officers and Constables) 1970 Regulations regs 1, 2, 3, 3(a), (b), (c), (d), (e), (f), (g), 4, 5, 6, 7, 8, 9

Public Officers (Conduct and Discipline) Regulations 1993 regs 2, 28, 36, 37, 38(g), 46, 46(1)

Appeal from: Civil Suit No MT3–21–2–2000 (High Court, Kota Bahru)

Aida Adha bt Abu Bakar (Nizar bt Zakaria with her) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
Md Latip bin Sarruggi (Murni Suranti with him) (Mohd Latif & Associates) for the respondent.

Zaleha Zahari JCA:

[1] We allowed the defendants' (appellants') appeal against the decision of the High Court judge dated 16 May 2005 in allowing the plaintiff's (respondent's) claim for the following reasons.

THE LAW

[2] The legal provisions referred to us in arguments in this appeal are these.

(a) Article 135(2) Federal Constitution

> 135
>
> (1) …
>
> (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:
>
> Provided that this clause shall not apply to the following cases:
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls:.

(b) The Police Act 1967

Sections 18 and 74 of the Police Act 1967 ('Police Act') provides as follows:

> 18. Save as otherwise provided in this Act and the Rules and Regulations made thereunder, every police officer shall unless expressly excluded be subject to the same provisions as are applicable to other public officers of corresponding status in the service of the Government of Malaysia.

…

…

74. All members of the Force shall be subject to regulations relating to discipline as may from time to time be made by the Yang di-Pertuan Agong under Article 132 (2) of the Federal Constitution or under section 96 of this Act.

(c) The Regulations

At the time of the plaintiff's dismissal in 1997 there were two regulations in force pertaining to matters of discipline governing members of the police force ie the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 (PU (A) 86/1970) ('the 1970 Regulations') and the Public Officers (Conduct and Discipline) Regulations 1993 (PU(A) 395/1993) ('the 1993 Regulations')

(i) The Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970

These Regulations made by the Yang Di-Pertuan Agong in exercise of the powers conferred by s 96 of the Police Act consists of only nine clauses.

Regulation 1, the citation clause, identifies the personnel subjected to the regulations. It applies to junior police officers and constables.

Regulation 2 specifies the disciplinary offences as being that prescribed in the Schedule annexed to the Regulations. The Schedule list 66 disciplinary offences.

Regulation 3 sets out the procedure to be followed when disciplinary proceedings are instituted against an officer. The various punishments that can be meted out are as set out in sub-para (a)–(g) upon a finding of guilt.

Regulations 4 and 5 set out the rights available to an officer who is subjected to disciplinary action. These include the right to be supplied with documents connected to the disciplinary offence and to be represented at the enquiry by a police officer of his choice.

Regulation 6 outlines the procedure to be followed at the enquiry (ie, the orderly room procedure) if the officer pleads guilty, and should he not plead guilty. The power to confirm and discharge the officer is given to the adjudicating authority in lieu of awarding any other punishment by virtue of reg 7 as is the power to adjourn any disciplinary enquiry from time to time (Regulation 8).

Regulation 9 refers to the revocation of Part 1 of the Police Regulations 1952.

The 1970 Regulations have since been repealed by the Police (Conduct and Discipline) (Junior Police Officers and Constables) (Repeal) Regulations 2000 (PU (A) 451/2000) with effect from 1 January 2001.

(ii) The Public Officers (Conduct and Discipline) Regulations 1993
The Public Officers (Conduct and Discipline) Regulations 1993 (PU (A) 395/1993) ('the 1993 Regulations') was made by the Yang di-Pertuan Agong in exercise of the powers conferred by cl 2 of art 132 of the Federal Constitution. It has been subjected to several amendments over the years. The provisions as it stood when the decision to dismiss the plaintiff from service was made in 1997, and accordingly which is applicable to the facts of this case, are these. Regulation 36 prescribes the procedure to be followed when an order of detention, supervision, restricted residence is made against an officer. It provides as follows:

36. (1) Where —

(a) an order of detention, supervision, restricted residence, banishment or deportation has been made against an officer; or

(b) an order which imposes on the officer any form of restriction or supervision, whether with bond or otherwise, has been made against an officer,

under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, … the Head of Department shall apply for a copy of the order from the appropriate authority. Upon receipt of a copy of such order, the Head of Department shall immediately submit it to the appropriate Disciplinary Authority that has the power to impose a punishment of dismissal or reduction in rank, and the appropriate Disciplinary Authority shall forthwith suspend the officer from the exercise of his duties.

(2) The Head of Department shall forward a report to the appropriate Disciplinary Authority that has the power to impose a punishment of dismissal or reduction in rank, together with the record of service of the officer, and shall recommend whether the officer should —

(a) be dismissed or reduced in rank;

(b) be imposed with any punishment other than the punishment of dismissal or reduction in rank;

(c) have his service terminated in the public interest; or

(d) not be imposed with any punishment,

depending on the extent the officer has brought disrepute to the public service.

37. (1) Where after considering the report and the recommendation of the Head of Department forwarded in accordance with … regulation 36, the appropriate Disciplinary Authority is of the opinion —

(a) that the officer should be dismissed or reduced in rank, the Disciplinary Authority shall forthwith impose the appropriate punishment;

(b) …

(c) …

On this issue reg 46 is also relevant. It provides as follows:

46. (1) The appropriate Disciplinary Authority that has the power to impose a punishment of dismissal or reduction in rank shall suspend an officer from the exercise of his duties —

(a) …

(b) where an order of detention or restriction as specified in regulation 36 is made or imposed against the officer.

(2) The date of suspension under this regulation shall commence from the effective date of the order of detention or restriction, as the case may be.

(3) An officer who is suspended from the exercise of his duties —

(a) …

(b) shall not be allowed to receive any emoluments from the date of his suspension.

(4) A decision to suspend the officer shall be conveyed to him in writing.

BACKGROUND

[3] The background facts are as follows: The plaintiff at the material time holds the rank of Corporal in the Royal Malaysia Police Force ('the Force').

[4] On 13 April 1997 the plaintiff was served with a show cause notice issued by the first defendant (in his capacity as the disciplinary authority) in respect of eight disciplinary offences. The plaintiff was informed that an inquiry would be held on 5 May 1997 at 10am. The inquiry however did not take place by reason of what subsequently transpired.

[5] The record shows that after the issuance and service of the said show cause notice, the Deputy Minister of Home Affairs had, on 15 April 1997, issued a restriction order under s 4(A)(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the 1969 Ordinance') against the plaintiff ('the restriction order') for a period of two years with effect from 15

April 1997 upon the conditions specified therein. The grounds upon which the restriction order was made was specified in the annexure to the restriction order. It states as follows:

> ORDINAN DARURAT (KETENTERAMAN AWAM DAN MENCEGAH JENAYAH) 5/69
>
> NAMA ORANG SEKATAN: ISHAK BIN MANSOR NO. K/P: 5721966
>
> ALASAN-ALASAN YANG ATASNYA PERINTAH ITU DIBUAT:
>
> Kamu adalah seorang ahli kumpulan samun dan peras ugut yang melakukan kegiatan jenayah kekerasan dimana tindakan kamu itu telah menjejas dan memudaratkan ketenteraman awam.
>
> TUDUHAN-TUDUHAN YANG PERINTAH ITU BERASASKAN:
>
> Bahawa kamu adalah seorang ahli kumpulan samun dan perasugut di sekitar Rantau Panjng, Kelantan. Di antara kegiatan Jenayah kekerasan yang kamu pernah terlibat ialah:
>
> (1) Bahawa kamu pada bulan Oktober, 1995, di Pengkalan Haram Pound, Rantau Panjang, Kelantan kamu bersama 8 orang rakan telah menahan dan memeriksa seramai 9 orang rakyat asing serta merampas wang sebanyak RM250.00 dari rakyat asing tersebut.
>
> Dengan Arahan,
>
> Timbalan Menteri Dalam Negeri
>
> t.t.
>
> (KASIM BIN MD. ISA)
>
> Penolong Setiausaha
>
> Kementerian Dalam Negeri

[6] The first defendant then, in exercise of the powers conferred by reg 46(1) of the 1993 Regulations, issued a letter dated 15 April 1997 by which letter the plaintiff was informed that pursuant to reg 46(1) of the 1993 Regulations he was suspended from exercising his duties and that he would not be paid any emoluments during the period of his suspension. The letter states as follows:

> Ibu Pejabat Polis Kontijen
>
> Polis DiRaja Malaysia
>
> 15990 Kota Bharu
>
> Kelantan
>
> Rujukan: (PR) RF/74999
>
> Tarikh: 15 April, 1997

Encik Ishak bin Mansor,

Kopral - RF/74999

GANTUNG KERJA

Adalah saya Nordin bin Zakaria, P/SAC II Timbalan Ketua Polis Kelantan, pada menjalankan kuasa-kuasa tatatertib yang diwakilkan kepada saya oleh Suruhanjaya Pasukan Polis melalui P.U.(B) 621 bertarikh 19/12/85, memandangkan anda telah dikenakan Perintah Sekatan di bawah seksyen Sek. 4A(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) No. 5/69 selama 2 tahun mulai 15 April 1997, di Bandaran Jasin, Daerah Jasin, Melaka, memutuskan iaitu anda di 'Gantung Kerja' di bawah peraturan 46 (1) peraturan-peraturan pegawai awam (Kelakuan dan Tatatertib) 1993 mulai 15 April 1997 iaitu tarikh anda dikenakan Perintah Sekatan.

2. Semasa anda di 'Gantung Kerja', anda tidak berhak menerima apa-apa bahagian emolumen yang tidak di bayar semasa anda di Tahan Kerja mengikut Peraturan 46 (3) (a) dan anda juga tidak berhak menerima apa-apa emolumen mulai tarikh anda di 'Gantung Kerja' mengikut Peraturan 46 (3) (b), Peraturan yang sama.

3. Sila akui penerimaan surat ini dengan menandatangani di ruangan yang telah di sediakan.

t.t.

(NORDIN BIN ZAKARIA) P/SAC II

TIMBALAN KETUA POLIS

KELANTAN

AKUAN TERIMA

Saya, Ishak bin Mansor mengaku menerima naskah asal surat gantung kerja bilangan RF 74999 bertarikh 15.4.1997 pada 16.4.1997 jam 1545 hrs.

Diserahkan oleh: (ALI BIN MOHAMAD) SUPT

Ketua Polis Daerah

18300 Gua Musang

Kelantan

Tarikh/Masa: 16.4.1997 1545 hrs.

[7] Thereafter, after considering the restriction order made against the plaintiff, the first defendant was of the opinion that the plaintiff should be dismissed from service. The first defendant then, in exercise of the powers conferred by regs 37–38(g) of the 1993 Regulations, by letter dated 16 April 1997, imposed the punishment of dismissal on the plaintiff with effect from the date of the restriction order. The letter states as follows:

Ibu Pejabat Polis Kontijen

Polis DiRaja Malaysia

15990 KotaBharu

Kelantan

Rujukan: (PR) RF/74999

Tarikh: 16 April, 1997

Encik Ishak bin Mansor,

Kopral - RF/74999

KEPUTUSAN TINDAKAN TATATERTIB

Adalah saya Nordin bin Zakaria, P/SAC II Timbalan Ketua Polis Kelantan, telah mendapati bahawa anda telah dikenakan Perintah Sekatan di bawah Sek. 4A(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) No. 5/69 selama 2 tahun mulai 15 April 1997, di Bandaran Jasin, Daerah Jasin, Melaka.

2. Oleh yang demikian saya Nordin bin Zakaria, P/SAC II Timbalan Ketua Polis Kelantan pada menjalankan kuasa-kuasa tatatertib yang telah diwakilkan oleh Suruhanjaya Pasukan Polis melalui P.U.(B) 621 bertarikh 19/12/1985 dan peruntukan kuasa di bawah Peraturan 37 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 dan setelah meneliti serta menimbangkan nota-nota yang diterima berkaitan kes tersebut, telah memutuskan anda di 'Buang Kerja' di bawah Peraturan 38(g),. Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 berkuatkausa mulai 15 April, 1997 iaitu tarikh anda dikenakan Perintah Sekatan.

3. Sila akui penerimaan surat ini dengan menandatangani di ruangan yang telah di sediakan.

t.t.

(NORDIN BIN ZAKARIA) P/SAC II

TIMBALAN KETUA POLIS

KELANTAN

AKUAN TERIMA

Saya, Ishak bin Mansor mengaku menerima naskah asal surat gantung kerja 74999 keputusan tindakan tatatertib bilangan (TR) RF 74999 bertarikh 16.4.1997 pada 16.4.1997 jam 1545 hrs.

Diserahkan oleh: (ALI BIN MOHAMAD) SUPT

Ketua Polis Daerah

18300 Gua Musang

Kelantan

Tarikh/Masa: 16.4.1997 1545 hrs.

THE PLAINTIFF'S APPLICATION

[8] The plaintiff filed a suit two years later. The original writ and statement

of claim filed by the plaintiff on 13 May 1999 named the Deputy Minister of Home Affairs as the first defendant, the disciplinary authority as the second defendant and the Government of Malaysia as the third defendant. The pleadings as initially framed by the plaintiff challenged the validity of the restriction order issued by the Deputy Minister of Home Affairs. Consequently, the plaintiff alleged that the decision to dismiss him by the disciplinary authority based on such a restriction order was invalid and had no legal effect

[9] The plaintiff amended his statement of claim almost three years later. By the amendments made to the statement of claim pursuant to order dated 15 April 2002, the Deputy Minister of Home Affairs was no longer a party to the proceedings. For ease of reference the new para 7 (g)–(h) of the amended statement of claim is set out below:

> (g) Bahawa Pihak Berkuasa Tataterib telah tidak mematuhi Peraturan 37 Peraturan-Peraturan Pegawai Awam Kelakuan dan Tatatertib) dalam melaksanakan proses pembuangan kerja keatas Plantif mengikut surat pembuangan kerja bertarikh 16-04-1997.
>
> (h) Bahawa Pihak Berkuasa Tataterib telah melanggari doktrin 'Legitimate Expectation' dalam pembuagan kerja ke atas Palintf.
>
> (i) Bahawa Pihak Berkuasa Tataterib mempunyai minda yang 'BIAS' dalam pembuangan kerja terhadap Plaintif.

[10] The amended declaratory orders sought by the plaintiff are: that his dismissal by letter dated 16 April 1997 under reg 37 of the 1993 Regulations was invalid and of no legal effect; that he was still an employee of the Government of Malaysia with the rank of Corporal in the Police Force, as well as for consequential orders.

THE HIGH COURT DECISION

[11] The learned High Court judge took the position that the matters in issue required him to answer two questions. Firstly, whether the 1993 Regulations applied to the plaintiff? If the answer to this question was 'Yes', that the 1993 Regulations applied to the plaintiff, then whether reg 37 of the 1993 Regulations had been complied with?

[12] Based on the evidence and submissions before him the learned judge ruled that the 1993 Regulations did not apply to the plaintiff. In view of this ruling there was accordingly no necessity for him to make a ruling on the second question.

[13] The learned judge's reasoning as to why the 1993 Regulations did not

apply to the plaintiff was this. The plaintiff holding the rank of corporal was a junior police officer. The learned judge was of the view that the plaintiff can only be subjected to one disciplinary regulations based on the authority of *Nordin bin Hj Zakaria P/SAC II Timbalan Ketua Polis Kelantan & Anor v Mohd Noor Abdullah* [2004] 3 AMR 689. That case concerns a police officer holding the rank of lance corporal. The complaint there was that of procedural unfairness by reason of the failure to inform the officer concerned of the likehood of being dismissed or reduced in rank. The contention in that case was that the 1993 Regulations applied. On this issue of alleged procedural unfairness the Federal Court ruled that the Court of Appeal had erred in importing reg 28 of the 1993 Regulations into the 1970 Regulations.

[14] The learned judge was of the view that in the absence of a similar provision similar to reg 37 of the 1993 Regulations being inserted into the 1970 Regulations, it was not open for the disciplinary authority to adopt the procedure set out in reg 37 of the 1993 Regulations to the plaintiff. The order of dismissal of the plaintiff made by the first defendant was then declared to be invalid. The plaintiff's application was then allowed. The order of dismissal made against the plaintiff was then set aside.

THE SUBMISSIONS

[15] The senior federal counsel (SFC) highlighted the fact that a public officer who is subjected to an order of detention, supervision, restricted residence, banishment or deportation, had no right of being heard as the proviso to cl 2 of art 135 of the Federal Constitution applied.

[16] The SFC submitted that the learned judge erred in ruling that the plaintiff can only be subjected to only one disciplinary regulations. According to her, in the absence of an express provision in the 1970 Regulations prescribing the procedure to be followed upon a junior police officer being subjected to an order of detention, supervision, restricted residence, banishment or deportation, the disciplinary authority was right in adopting the procedure prescribed covering this express situation as provided under reg 37 of the 1993 Regulations.

[17] As to the decision of the Federal Court upon which the learned judge's decision was grounded, *Nordin bin Hj Zakaria P/SAC II Timbalan Ketua Polis Kelantan & Anor v Mohd Noor Abdullah*, the SFC submitted that that case can be distinguished on facts. The procedure consequent upon the issuance of a resrtriction order againts a junior police officer was not an issue in that case.

[18] The record shows that all of the regulations in particular, reg 37, had

been strictly complied with. The dismissal of the plaintiff was in accordance with the procedure prescribed by law, and accordingly valid and of full legal effect.

[19] The submission of the respondent's counsel was in line with the reasoning given by the High Court judge in his judgment.

DECISION

[20] As submitted by the SFC and the respondent's counsel, judicial review is concerned with the decision making process. The issue for determination in this case is, what is the procedure to be adopted by a disciplinary authority upon being notified that a restriction order under the 1969 Ordinance had been made against the plaintiff, a junior police officer?

[21] We would like to firstly make the following observations. The restriction order issued against the plaintiff was for a period of two years, from 15 April 1997–15 April 1999. This action was filed on 13 May 1999, after the restriction order had already lapsed. Be that as it may the plaintiff deemed it fit to challenge the validity of the already spent restriction order. The plaintiff's case was that the order of dismissal based on the already spent restriction order was invalid.

[22] The amendment in 2002 to the statement of claim clearly had the following effect. The validity of the restriction order issued by the Minister of Home Affairs against the plaintiff was no longer the subject matter of challenge. The cause of action, consequent upon the amended pleadings, was no longer grounded on an invalid restriction order but allegedly by reason of the disciplinary authority having adopted a procedure which was not applicable to him.

[23] Pausing here for a moment, by reason of the restriction order no longer being challenged, this must necessarily be construed to mean that the plaintiff accepts that the restriction order issued against him as being valid and of full legal effect. In any event it is now settled law that it is not for the disciplinary authority to question the validity of the restriction order issued against the plaintiff. The validity of such an order is clearly not open to collateral attack (see *Selvaraju Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 7 MLJ 1; [2007] 6 CLJ 245).

[24] The learned judge was persuaded by the submissions of the plaintiff's counsel. He ruled that the plaintiff can only be subjected to only one disciplinary regulations. Consequent upon the restriction order being issued against the plaintiff, the 1970 Regulations was the regulations that was

applicable to the plaintiff. He ruled that the disciplinary authority had erred in adopting the procedure prescribed in the 1993 Regulations.

[25] We take the view that the provisions of the Federal Constitution, the Police Act as well as the 1970 and 1993 Regulations must be read together and be given a harmonious construction. Our reading of the legal provisions referred to us in arguments are as follows. Every police officer unless expressly excluded is subject to the same provisions as are applicable to other public officers of corresponding status in the service of the Government of Malaysia (s 74 of the Police Act). Pursuant to art 132 of the Federal Constitution a member of the police force is a member of the public service.

[26] All members of the Police Force are also subject to regulations relating to discipline as may from time to time be made by the Yang di-Pertuan Agong under art 132(2) of the Federal Constitution or under s 96 of this Act (s 18 of the Police Act). This would in our view also include junior police officers.

[27] With respect, we are unable to agree with the learned judge's ruling that a junior police officer can only be subjected to only one disciplinary regulations. There is no such general principle. A junior police force can certainly be subjected to more than one. Whether or not a particular regulation is applicable to such an officer must necessarily depend on the express words used in that regulations. In this case the applicability of the 1993 Regulations to an officer such as the plaintiff must certainly be determined by examining the provisions of the 1993 Regulations itself.

[28] Our reading of the provisions referred to us was that, not only was the 1970 Regulations applicable to the plaintiff, but the 1993 Regulations was equally applicable to him. We note that there is no clause in the 1993 Regulations expressly excluding junior police officers from its application. In our considered opinion effect must be given to reg 2 of the 1993 Regulations which expressly provides that the 1993 Regulations applies to an 'officer' throughout the period of his service. The same section defines an 'officer' to mean 'a member of the public service of the Federation', of which the plaintiff was certainly one.

[29] In view of the fact that there is no express provision as to the procedure to be followed by the disciplinary authority in the 1970 Regulations when a restriction order is issued against such an officer, the disciplinary authority was, in our considered opinion; right in following the procedure prescribed to cover this express situation, ie that prescribed by reg 37 of the 1993 Regulations. This particular misconduct it is to be noted is not expressly listed in the Schedule to the 1970 Regulations.

[30] Such a construction would accordingly be in accord with cl 2 (d) of art 135 of the Federal Constitution. The plaintiff, being the subject of a restriction order under the 1969 Ordinance, was clearly not entitled to be given the right to be heard. The interpretation given by the learned judge in ruling that reg 37 of the 1993 Regulations was not applicable to the plaintiff would result in the disciplinary authority having to observe the orderly room procedure in respect of the misconduct that had been committed: the plaintiff to be given a hearing, to be represented by a police officer of his choice, in other words, the right to be heard. Such an interpretation was clearly inconsistent with the intention of the legislature taking away the right of such a public officer who was the subject of such an order to be heard.

[31] We are accordingly in agreement with the submissions of the SFC that the case of *Nordin bin Hj Zakaria P/SAC II Timbalan Ketua Polis Kelantan & Anor v Mohd Noor Abdullah* can be distinguished on facts. The procedure to be followed consequent upon the issuance of a restriction order under the 1969 Ordinance against a junior police officer clearly was not an issue in that case.

[32] To sum up, we are of the view that there is no flaw in the decision making process of the disciplinary authority in making the order of dismissal against the plaintiff. Once the restriction order under the 1969 Ordinance had been issued by the Minister of Home Affairs against the plaintiff, it was incumbent upon the disciplinary authority to exercise the power conferred upon them by regs 36 and 46. Thereafter, reg 37 of the 1993 Regulations applied.

[33] In considering the appropriate punishment to be imposed, the disciplinary authority had deemed it fit to impose the most severe punishment upon the plaintiff. There is no basis whatsoever for us the interfere with the said decision. To conclude, our finding is that the order of dismissal made by the first defendant was accordingly valid and of full legal effect.

[34] For the abovementioned reasons the defendants' appeal was allowed with costs.

Appeal allowed with costs.

Reported by Ibnu Aswan